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No. 82-501

IN THE

Supreme Court of the United States

October Term, 1982

EUGENE H. EUSTER, SAMUEL FIERAMOSCA, DANIEL LOPEZ, DAVID HASBANY and MARTIN J. FALLON, JR.,

Petitioners

v.

PENNSYLVANIA HORSE RACING COMMISSION; ANDREW R. JOHNSON, Chairman, and MARLYN MOYER and WILLIAM D. GROSS, Commissioners,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, JOCKEYS' GUILD, INC., IN OPPOSITION TO PETITION

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF AMICUS CURIAE, JOCKEYS' GUILD INC., FOR LEAVE TO FILE BRIEF IN OPPOSITION TO PETITION

Amicus curiae, Jockeys' Guild, Inc. ("Guild"), respectfully moves for leave to file the brief attached hereto

in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit by petitioners Eugene H. Euster, Samuel Fieramosca, Daniel Lopez, David Hasbany, and Martin J. Fallon, Jr. (hereinafter collectively referred to as "Horsemen"). The motion is based on the grounds that:

1. Consent to file the attached brief has been denied by one of the parties to this action.

2. The Guild is a national association which provides for the welfare of jockeys in the thoroughbred racing industry. It furnishes (i) representation and, through appropriate insurance carriers, life insurance, health insurance and disability benefits for active jockeys and (ii) direct financial aid for permanently disabled jockeys. The Guild has approximately 1,500 active members. These constitute the vast majority of the active jockeys in the United States. Many of the Guild's members are licensed to ride in Pennsylvania.

3. The instant case centers on the promulgation by the Pennsylvania Horse Racing Commission of Rule of Racing 9.15 ("Rule 9.15") which specifies jockey fees in Pennsylvania. Accordingly, the Guild and its membership have an obvious interest in its fate.

4. The Guild filed a brief and presented oral argument as amicus curiae in the proceedings below in the United States Court of Appeals for the Third Circuit.

5. The Guild was also a defendant in the companion case of *Horsemen's Benevolent and Protective Association, Inc. v. Pennsylvania Horse Racing Comm'n*, 1982-1 CCH Trade Cases, ¶ 64,604 (E. D. Pa. 1982), which was decided on the same ground as the instant case and affirmed by the United States Court of Appeals for the Third Circuit on the authority of its decision in the instant matter.

For the foregoing reasons, the Guild respectfully requests leave to file the amicus curiae brief attached hereto in opposition to the Horsemen's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE, JOCKEYS' GUILD, INC., IN OPPOSITION TO PETITION

Amicus curiae, Jockeys' Guild, Inc. ("Guild"), respectfully submits this brief in opposition to the petition

for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by petitioners, Eugene H. Euster, Samuel Fieramosca, Daniel Lopez, David Hasbany and Martin J. Fallon, Jr. ("hereinafter collectively referred to as "Horsemen"), and respectfully prays that the petition for a writ of certiorari be denied.

INTEREST OF AMICUS CURIAE

The Guild is a national association which provides for the welfare of jockeys in the thoroughbred racing industry. It furnishes (i) representation and, through appropriate insurance carriers, life insurance, health insurance and disability benefits for active jockeys and (ii) direct financial aid for permanently disabled jockeys. The Guild has approximately 1500 active members. These constitute the vast majority of the active jockeys in the United States. Many of the Guild's members are licensed to ride in Pennsylvania.

The instant case centers on the promulgation by the Pennsylvania Horse Racing Commission of Rule of Racing 9.15 ("Rule 9.15") which specifies jockey fees in Pennsylvania. Accordingly, the Guild and its membership have an obvious interest in its fate.

In the proceedings below, in the United States Court of Appeals for the Third Circuit, the Guild submitted a brief and presented argument as amicus curiae. The Guild was also a defendant in the companion case of *Horsemen's Benevolent and Protective Association, Inc. v. Pennsylvania Horse Racing Comm'n*, 1982-1 CCH Trade Cases, ¶ 64,604 (E. D. Pa. 1982), which was decided on the same ground as the instant case and affirmed by the United States Court of Appeals for the Third Circuit on the authority of its decision in the instant matter.

SUMMARY OF ARGUMENT

In the proceedings below, a panel of the United States Court of Appeals for the Third Circuit held that a Pennsylvania statute, as authoritatively construed by the Pennsylvania Supreme Court, "clearly articulated and affirmatively expressed as state policy" the restraint of trade which the Horsemen attack under the antitrust laws. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980) (setting forth standards for "state action" immunity). The court's decision focused primarily on the meaning of the Pennsylvania statute; it raised no issues of novel or general significance for the "state action" doctrine. Notwithstanding the Horsemen's arguments to the contrary, the panel's legal analysis is perfectly consistent with the decisions of courts of appeals for other circuits and with the rulings of this Court. The distinctions between the present case and those cited by the Horsemen in support of their petition are merely factual.

ARGUMENT

The instant case raises no issue of major public importance. The Third Circuit decision is based on an interpretation of a Pennsylvania statute—the Pennsylvania Horse Racing Act ("Horse Racing Act"), PA. STAT. ANN. tit. 15, § 2651 *et seq.* (Purdon) (repealed 1981 and reenacted in pertinent part as the Race Horse Industry Reform Act, PA. STAT. ANN. tit. 4, § 325.101 *et seq.* (Purdon)). The Third Circuit determined that the promulgation of a jockey fee scale by the Pennsylvania Horse Racing Commission ("Commission") was the kind of action contemplated by that statute. *Euster v. Pennsylvania Horse Racing Comm'n*, 677 F. 2d 992, 995 (3d Cir. 1982), *citing Community Communications Co., Inc. v. City of Boulder*, — U. S. —, 102 S. Ct. 835, 840 n. 12 (1982) and *City of Lafayette v. Louisiana Power & Light Co.*, 532 F. 2d 431, 434 (5th Cir. 1976), *aff'd*, 435 U. S. 389 (1978). (Petitioners' Appendix A7-8).

In 1967, the Pennsylvania General Assembly passed the Horse Racing Act, creating the Commission, and charging it with supervising thoroughbred horse racing, which had previously been an unlawful, criminal activity. The statute makes clear that the legislature contemplated a new industry which would be pervasively regulated rather than one which would be subject to the give-and-take of the free enterprise system. Thus, it directs the Commission "to supervise generally all thoroughbred horse racing meetings in this State at which pari-mutuel betting is conducted." PA. STAT. ANN. tit. 15, § 2652. In addition, however, the statute also directs the following anticompetitive activity:

(1) Commission fixes admission charges to race meetings—§ 2652;

(2) Statute restricts those who may own stock in racing association—§ 2654;

(3) Statute limits active racing associations in any one year to six—§ 2655;

(4) Statute prohibits involvement of racing associations in both thoroughbred and harness racing—§ 2655;

(5) Statute prohibits racing association from conducting racing more than 100 days per year—§ 2655;

(6) Statute prohibits license for racing within ten miles of state or county fair without consent—§ 2657;

(7) Commission fixes compensation of stewards, judges and starters—§ 2660;

(8) Commission may license (pursuant to broad standards) trainers, jockeys and other participants, including, at the option of the Commission, owners "and some or all persons exercising their occupation or employed at thoroughbred horse race meets"—§ 2661.

The scope and nature of the Horse Racing Act leave little doubt that the legislature contemplated the issuance of rules by the Commission which would restrain competition and pervasively regulate the previously criminal activity of thoroughbred horse racing.[1] Moreover, the short answer to the Horsemen's contention is that the legislature is not required by the *Parker* v. *Brown* doctrine specifically to authorize the precise restraint in question,

1. Pursuant to its rulemaking authority, the Commission has issued, *inter alia*, numerous rules regulating the conduct of jockeys, for example, the requirement that jockeys be licensed, that no licensed jockey may be an owner or trainer of any race horse, and that jockeys not bet on any race except through the owner or trainer of the horse he or she rides and only on that horse. 58 PA. CODE § 163.171 *et seq.*

in this instance the promulgation by the Commission of the jockey fee scale embodied in Rule 9.15. Thus, for example, in *Community Communications Co. v. City of Boulder*, — U. S. —, 102 S. Ct. 835 (1982), Justice Brennan quoted as follows from the court of appeals decision in *City of Lafayette v. Louisiana Power & Light Co.*, 532 F. 2d 431, 434 (5th Cir. 1976), *aff'd*, 435 U. S. 389 (1978):

> "[I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to act in a particular area, that the legislature contemplated the kind of action complained of."

102 S. Ct. at 840 n. 12.[2] In sum, if the scrutiny of the statute itself leaves any doubt, the intent of the Pennsylvania legislature may be ascertained "from the authority given [to the Commission] to act in a particular area."

In this regard, the construction of the Horse Racing Act by the Supreme Court of the Commonwealth of Pennsylvania in *Gilligan v. Pennsylvania Horse Racing Comm'n*, 492 Pa. 92, 422 A. 2d 487 (1980) is especially relevant. In that case, the court held that promulgation of a jockey fee scale was within the power of the Commission, and moreover, that such action by the Commission was not only appropriate, but also necessary:

> In the exercise of its supervisory responsibilities, the Commission reasonably has concluded that in order

2. In *City of Lafayette*, this Court quoted and expressly approved this standard as "an adequate state mandate for anticompetitive activities of cities." 435 U. S. at 415. *See Areeda, Antitrust Immunity for "State Action" after Lafayette*, 95 *Harv. L. Rev.* 435, 445-48 (1981).

> to deter criminal influence in the horse racing industry it is vital, *inter alia*, to guarantee adequate fees for jockeys.
>
> • • •
>
> The breadth of the Commission's powers is required for the prevention of corruption and maintenance of high standards and public confidence in racing. The imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with —indeed, necessary to accomplish—these legislative goals.

492 Pa. at 98 n. 9 and 98, 422 A. 2d at 491 n. 9 and 490-91.[3]

The crux of the instant case, therefore, is nothing more than an interpretation of a specific statute in an effort to determine whether a particular restraint of trade—the promulgation of a jockey fee scale—was affirmatively expressed and clearly articulated as state policy. The lower courts held that it was, and in reaching this decision, they properly deferred to and deemed themselves bound by the Pennsylvania Supreme Court's interpretation of the statute in question. *See, e.g., Community Communications Co., Inc. v. City of Boulder*, — U. S. —, 102 S. Ct. 835, 841 n. 15 (1982) ("But it is not for us to determine

3. The Pennsylvania Supreme Court also held that, by amending the statute, including the section which gives the Commission rulemaking powers, eight years after the Commission had begun fixing a jockey fee scale and not curtailing this authority, the legislature had manifested approval of the practice. 492 Pa. at 99, 422 A. 2d at 491.

The legislature further manifested its approval when it repealed the statute in 1981, re-enacted its provisions in pertinent part as the Race Horse Industry Reform Act, and still did not curtail the authority of the Commission to promulgate a jockey fee scale.

the correct view on [the] issue [before the Court] as a matter of state law,"); *Mullaney v. Wilbur*, 421 U. S. 684, 691 (1975) (federal courts bound by state court's construction of state's statute).

Because the decision in this case rests on the meaning of a state statute, it raises no questions of significance for the nation as a whole. Furthermore, the lower courts did not apply relevant federal antitrust principles in a manner inconsistent either with courts of appeals for other circuits or with the decisions of this Court. On the contrary, what distinguishes cases such as *United States v. Texas State Board of Public Accountancy*, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd as modified*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979), *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), and *Boulder* are merely the factual conclusions, namely the finding in those cases that the challenged restraints had not been articulated clearly as state policy.

Finally, *Boulder* and *Goldfarb* each raised issues of national significance for the "state action" doctrine, the applicability of the antitrust laws to home rule cities and the learned professions respectively. The instant case, by contrast, raises no such issue.

CONCLUSION

For the foregoing reasons, the Jockeys' Guild, Inc., amicus curiae in this action, respectfully urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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